

Rodas-Garcia v NYC United LLC

2023 NY Slip Op 30504(U)

February 17, 2023

Supreme Court, New York County

Docket Number: Index No. 153434/2018

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

BAIRON RODAS-GARCIA,

Plaintiff,

- v -

NYC UNITED LLC,

Defendant.

-----X

NYC UNITED LLC

Plaintiff,

-against-

BDB CONSTRUCTION ENTERPRISE INC.

Defendant.

-----X

INDEX NO. 153434/2018

MOTION DATE 02/16/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596020/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff’s motion for partial summary judgment on his Labor Law § 240(1) claim is granted. Defendant NYC United LLC’s cross-motion is granted in part and denied in part.

Background

This Labor Law action arises out of plaintiff’s work at a construction site. He claims that on the day of his accident (while working for the third-party defendant), he was told to use a 12-foot ladder (NYSCEF Doc. No. 77 at 112). He was assigned to fix up the ceiling and put plaster on it (*id.* at 122). Plaintiff testified that as he was walking up the ladder, and both feet reached

the eleventh step, the ladder moved to the left (*id.* at 168-69). He explained that “The ladder fell to the left-hand side and I fell to the right-hand side onto my back” (*id.* at 170). Plaintiff added that as the ladder moved, it pulled his right foot and he fell with it (*id.* at 171).

Plaintiff contends that this accident directly implicates Labor Law § 240(1) and he is entitled to summary judgment on this claim. He argues that he was engaged in construction work under the Labor Law and fell from a height.

In opposition and in support of its cross-motion, NYC United argues that plaintiff’s own actions bar him from recovering under Labor Law § 240(1) and that plaintiff’s claims under Labor Law §§ 241(6) and 200 should be dismissed. It also seeks summary judgment on its third-party claims against third party defendant BDB Construction Enterprise Inc. (“BDB”) for contractual defense and indemnification and failure to procure insurance.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a

summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Labor Law § 240(1)

“Labor Law § 240(1), often called the ‘scaffold law,’ provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to construction workers employed on the premises” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). “Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*id.* at 501).

“[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough” (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

The Court grants plaintiff’s motion for partial summary judgment on this claim. Plaintiff met his prima facie burden to show that he fell from a height when the ladder he was working on suddenly moved. NYC United’s claim that plaintiff was the sole proximate cause of the accident is not sufficiently supported. It argues that the ladder was in perfect working condition and that

the mere fact that plaintiff fell off the ladder does not entitle him to summary judgment on this claim.

NYC United's assertion that plaintiff overextended himself is not supported with admissible evidence. That is, nothing was submitted by someone who personally witnessed the accident to raise an issue of fact (or to grant NYC United's cross-motion on this claim) about whether plaintiff was the sole proximate cause of his own accident. In fact, the deposition of plaintiff's boss (Mr. Bhutta) revealed that the incident report was entirely hearsay. Mr. Bhutta claimed that the account of the incident was relayed to him by Mario (the person who was directing plaintiff at the job site that day) (NYSCEF Doc. No. 96 at 44). In other words, NYC United cannot raise a material issue of fact based solely upon a hearsay account of an unwitnessed accident. And while NYC United takes issue with the expert report of plaintiff, NYC United did not submit its own expert report. In any event, that expert report is not dispositive.

The Court recognizes NYC United's position that the ladder was not defective and it must have been plaintiff's fault. But NYC United did not submit sufficient proof that the ladder was not defective and that plaintiff's own actions caused the subject incident. The fact is that plaintiff claims that he was simply performing the task assigned to him when the ladder suddenly moved, which caused him to fall onto his back. That satisfies his prima facie burden and NYC United did not offer anything, other than speculation, to defeat this motion.

Labor Law § 241(6)

The Court grants the branches of NYC United's motion to dismiss plaintiff's claims brought pursuant to Labor Law § 241(6). Plaintiff failed to specifically address the arguments raised by NYC United regarding the various Industrial Code sections. The Court observes that in

its cross-motion, NYC United detailed why each of the claimed Industrial Code sections should be dismissed (NYSCEF Doc. No. 100 at 7-9) and plaintiff did not mention a single Industrial Code Section in his reply/opposition to the cross-motion. Therefore, this cause of action is severed and dismissed.

Labor Law § 200

Labor Law § 200 “codifies landowners’ and general contractors’ common-law duty to maintain a safe workplace” (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). “[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control” (*id.* [internal quotations and citation omitted]).

“Claims for personal injury under this statute and the common law fall under two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44, 950 NYS2d 35 [1st Dept 2012]). “Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it” (*id.* at 144).

“Where an alleged defect or dangerous condition arises from a subcontractor’s methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or section 200” (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272, 841 NYS2d 249 [1st Dept 2007]).

The Court severs and dismisses this cause of action as well. NYC United argues that it did not supervise, direct, or control the means and methods of plaintiff's work. It emphasizes that the only people on site worked for BDB (including plaintiff) and that it did not supply any equipment, including the ladder at issue.

Plaintiff's opposition focuses solely on the notion that there is an issue of fact relating to whether or not a dangerous condition existed. But that is not sufficient to defeat this branch of NYC United's motion because he did not sufficiently address the argument that NYC United did not control the means and methods of his work. The Court is unable to find that NYC United had a duty to plaintiff where there is no evidence it directed or supervised his work that led to the accident.

Third-Party Claims

NYC United moves for summary judgment on its third-party claims for contractual defense and indemnity as well as its cause of action for breach of contract against BDB on the ground that it never procured insurance as required under the parties' contract. NYC United insist that BDB failed to name NYC United as an additional insured.

In opposition, BDB argues that NYC United's cross-motion is procedurally defective as it is not a true cross-motion. It argues that there are issues of fact that compel the Court to deny these branches of the cross-motion. BDB claims that NYC United provided nothing in support of the claim that BDB failed to procure insurance and that the deposition of BDB's witness revealed nothing dispositive about this issue. Apparently, the witness could not remember whether or not insurance was procured that named NYC United as an additional insured.

In reply, NYC United insists its cross-motion is proper. It also observes that BDB did not oppose the portion of the cross-motion that seeks defense and indemnity.

The Court grants this branch of NYC United's cross-motion. As an initial matter, the Court observes that whether or not NYC United's cross-motion is a proper cross-motion is immaterial. The fact is that this cross-motion was timely filed (within 120 days of the filing of the note of issue), NYC United paid the proper filing fee and BDB had an opportunity to be heard. The problem identified by BDB is when a motion is mislabeled as a cross-motion after the deadline to make a dispositive motion has already passed. That is not what happened here. Because the instant motion was timely and the proper party has the opportunity to oppose, the title of this application is not dispositive under these circumstances.

Turning to the merits, the Court observes that NYC United met its burden on both causes of action. It established that its contract with BDB required BDB to procure insurance that named NYC United as an additional insured (NYSCEF Doc. No. 98). The burden then shifted to BDB to show that 1) it had acquired the insurance and 2) to raise a material issue of fact about why contractual indemnification is not appropriate here.

BDB did neither in its opposition. Instead, BDB appears to argue that it was NYC United's burden to prove a negative, namely that NYC United had to prove that BDB failed to procure insurance. That attempt at burden shifting is without merit. While BDB is correct that the deposition of its witness does not shed much light about whether BDB got insurance (the witness could not recall), that does not alleviate BDB of its burden to show it complied with its contractual obligations in opposition to the motion. BDB does not dispute that it entered into the contract with NYC United. Therefore, it was BDB's burden (and not NYC United's role) to show that it procured an insurance contract that named NYC United as an additional insured. NYC United also correctly pointed out that BDB did not directly oppose the branch of the motion that seeks indemnification.

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim is granted; and it is further

ORDERED that NYC United LLC's cross-motion is granted only to the extent that plaintiff's Labor Law §§ 200 and 241(6) claims are severed and dismissed and granted to the extent it sought summary judgment on its claims for contractual indemnification and failure to procure insurance against third-party defendant BDB Construction Enterprise Inc.; and it is further

DECLARED that NYC United LLC is entitled to defense and indemnity from BDB Construction Enterprise Inc. arising out of the accident that forms the basis of this litigation.

2/17/2023

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE